

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

CRIMINAL NO. 17-965 MCA

vs.

KIRBY CLEVELAND,

Defendant.

**UNITED STATES' AND DEFENDANT'S JOINT MOTION TO DESIGNATE
THIS CASE COMPLEX UNDER 18 U.S.C. § 3161(h)(7)(B)(ii)
AND ISSUE DISCOVERY, CONFERENCE AND MOTIONS DEADLINES**

The United States of America, by and through its attorneys, James D. Tierney, Acting United States Attorney for the District of New Mexico, and Michael D. Murphy and Niki Tapia-Brito, Assistant United States Attorneys for said district, and Donald Kochersberger and Theresa M. Duncan, counsel for Defendant Kirby Cleveland, move the Court for an order designating this a complex case pursuant to 18 U.S.C. § 3161(h)(7)(B)(ii). The parties further request that the Court hold a scheduling conference and issue an order that establishes discovery, conference, and motions deadlines tailored to the unique exigencies of this case. In support of the motion, the parties state the following:

1. The Indictment in this case charges the above-named defendant with a crime which may carry a penalty of death. *See* Indictment, filed April 12, 2017 (Doc. 20).
2. This case was initiated by a criminal Complaint filed March 14, 2017 and pertaining to events alleged to have occurred on March 11 and 12, 2017. Following the

Defendant's preliminary and detention hearings, the latter of which he waived, the Court detained him pre-trial. (Doc. 16).

3. Attorneys Donald Kochersberger and Theresa M. Duncan have been appointed counsel.

4. A standard Discovery Order (Doc. 24) was entered by the Magistrate Judge on April 20, 2017 and on that same day the Court entered notices of hearing setting this matter for Call of the Calendar on June 1, 2017 and Jury Trial on June 5, 2017. (Doc. 25).

5. Pursuant to 18 U.S.C. § 3161(h)(7)(A), the parties request that this Court hold a status conference and establish a discovery and case management schedule for this case.¹ The parties request that this Court, for the reasons stated below, find that this case is "complex" under 18 U.S.C. § 3161(h)(7)(B)(ii). The parties further request that this Court find that the ends of justice served by the granting of this motion "outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A).

6. The crimes charged in this case have been investigated by a team comprised of two primary law enforcement agencies (the Federal Bureau of Investigation (FBI) and the Navajo Nation Department of Public Safety) with assistance from, among others, the New Mexico State Police and the McKinley County Sheriff's Department. These agencies have employed numerous of investigative techniques with respect to their investigation. That investigation and the numerous witnesses at the scene of the crime shortly after the shooting at issue has resulted in substantial discovery.

7. Forensic evidence was collected by law enforcement in this case. The

¹ The standard discovery order issued upon arraignment and pursuant to local rules is not designed to accommodate complex cases such as the instant case.

nature of this evidence requires the government to use experts in various fields, i.e. DNA, firearms and ammunition, and forensic or medical experts.

8. As the United States expects to continue obtaining documents and evidence as this case progresses toward trial, discovery will likely be an ongoing process. Defense counsel, understandably, will need a period of time beyond the usual 70 days prescribed in the Speedy Trial Act to digest the discovery, conduct their own investigation, advise their client, conduct plea negotiations, file and litigate pretrial motions, and prepare for trial.

9. Because some of the crimes charged in the Indictment carry the possibility of a sentence of death, an internal review of the case must be made and, after a submission by counsel for the Defendant, the United States must make the election, through the Attorney General, of whether to seek the death penalty.

10. Because of the nature of this prosecution and the discovery, the parties submit “that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by [18 U.S.C. § 3161(c)(1).]” 18 U.S.C. § 3161(h)(7)(B)(ii) (establishing 70-day deadline by which to commence trial).

11. Counsel for the Defendant were contacted and join in this motion.

WHEREFORE, for the foregoing reasons, the United States and Defendant Kirby Cleveland request that the Court grant this motion, declare this case “complex” under 18 U.S.C. § 3161(h)(7)(B)(ii), extend the discovery deadline for the government, and at the appropriate time hold a scheduling conference and issue a global scheduling order governing discovery, conference, and motions deadlines.

Respectfully submitted,

JAMES D. TIERNEY
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Electronically filed May 11, 2017

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Approved by e-mail on May 11, 2017

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I hereby certify that on May 11, 2017
I filed the foregoing electronically through
the CM/ECF system, which caused counsel for
the Defendant to be served by Electronic means,
as more fully reflected on the Notice of Electronic
Filing.

Electronically filed May 11, 2017

MICHAEL D. MURPHY
Assistant United States Attorney